Supreme Court, U.S.
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No. --

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RADIO ASSOCIATION DEFENDING AIRWAVE RIGHTS, INC. (RADAR);
FRANK FIGUERO

Petitioners

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Federal Highway Administration

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the constitutionally required separation of powers between coordinate branches of the federal government breached by Congressional enactment of a rider to the 1992 Department of Transportation Appropriations Act, which required the Federal Highway Administration (FHWA), an Executive Branch Agency, to institute a rulemaking to ban radar detectors in Commercial Motor Vehicles (CMV's), where FHWA had twice refused to initiate this rulemaking because it had determined that a rule was not justified upon its professional review of all safety data and was prohibited by Executive Order 12621 which governed its actions?

2. May, consistent with the strictures of the Administrative Procedure Act, 5 U.S.C. § 706, and the provisions of the Motor Carrier Safety Act, 49 U.S.C. App. § 2505 (c)(2), which prohibits the unnecessary preemption of State laws, the "displeasure" of the Senate Appropriations Committee properly result in a rulemaking banning radar detectors in CMV's which superseded the legislative determination of 40 states which had rejected radar detector bans?

3. Did the FHWA's unexplained reversal of its position in response to the Rider enacted to the Appropriations bill governing its budget, ignore the mandated evaluation of the cost of the regulation, including the cost to the 50 states in the enforcement of the administrative ban, and result in an unfunded administrative mandate to the 50 states, which Congress had refused to impose by enacting legislation banning the use of radar detectors in CMV's?

4. Is FHWA's rule, which makes no assessment of the threshold issue of whether radar detectors cause or contribute to the risk of CMV accidents, which fails to evaluate the effect of the rule itself upon speed distributions

within the overall traffic stream and the risk of CMV accidents, which does not address the purported efficacy of the rule in light of acknowledged CMV crash data regarding heavy trucks, which assumes the efficacy of detector bans to be imposed upon states which have refused to ban detectors, and which reverses without explanation or response to the comments which it solicited, FHWA's repeated professional judgment that no rule banning radar detectors should issue, arbitrary and capricious?

PARTIES

The Petitioners are the Radio Association Defending Airwave Rights, Inc. (RADAR) and Frank Figuero. RADAR is a trade association representing nationwide the manufacturers of radar detectors and motor vehicle operators who use radar detectors. Frank Figuero is a commercial motor vehicle (CMV) operator who uses his radar detector while traveling in interstate commerce. Petitioners have no parent companies or subsidiaries required to be listed pursuant to Rule 29.1.

The Respondent, The United States Department of Transportation, Federal Highway Administration (FHWA), is an executive agency of the United States Government.

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1. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE SEPARATION OF CONGRESSIONAL AND EXECUTIVE POWERS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FHWA'S PROFESSIONAL JUDGMENT WAS CLEAR THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A RADAR DETECTOR

BAN. BASED UPON ITS REVIEW OF TRAFFIC SAFETY DATA, FHWA INTERPRETED THE EXECUTIVE ORDER CONTROLLING ITS ACTIONS TO REQUIRE THAT NO RULE ISSUE. WITHOUT THE INTRODUCTION OF LEGISLATION SEEKING TO AMEND OR REVISE THE MOTOR CARRIER SAFETY ACT OR TO PROHIBIT RADAR DETECTORS IN COMMERCIAL MOTOR VEHICLES AND WITHOUT THE BENEFIT OF CONGRESSIONAL HEARINGS ADDRESSED TO THE SUBSTANCE OF A RADAR DETECTOR BAN, CONGRESS USURPED FHWA'S EXECUTIVE FUNCTION BY ENACTMENT OF A RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT REQUIRING FHWA TO REVERSE ITS PROFESSIONAL JUDGMENT AND TO COMMENCE RULEMAKING TO BAN RADAR DETECTORS IN CMV'S..... 16

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Radio Association Defending Airwave Rights, Inc. (RADAR) and Frank Figuero, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 17, 1995.

REFERENCE TO OPINIONS BELOW

The Final Rule of the United States Department of Transportation, Federal Highway Administration, amending 49 CFR Parts 390 and 392 to ban the use of radar detectors in all commercial motor vehicles (CMVs) as defined in 49 CFR 390.5 [FHWA Docket No. MC-90-141 RIN 2125-AC69] (Issued December 14, 1993, Effective Date January 20, 1994) is set forth in the Appendix at page A-30-50. The Final Rule of the FHWA is published in Federal Register, Vol.58, No. 243, Tuesday December 21, 1993 at p. 67370-67375.

The judgment for which a writ of certiorari is sought to the United States Court of Appeals for the Sixth Circuit, denies the Petition filed by Petitioners herein to enjoin, suspend, and determine the validity of the Rule of the FHWA banning the use of radar detectors in CMVs, Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, No. 94-3140, slip. op. (6th Cir. February 17, 1995) and is set forth in the Appendix at page A-1 - A-29. The citation to the published opinion is Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, 47 F.3d 794 (6th Cir. 1995).

STATEMENT OF JURISDICTION OF THE UNITED STATES SUPREME COURT

The date of the entry of the judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed is February 17, 1995. The statutory provision conferring jurisdiction on the United States Supreme Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The provisions are lengthy and are set forth in the Appendix beginning at pages A-69-94.

Constitutional Provisions

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STATEMENT OF THE CASE

A. JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction was asserted by the Federal Highway Administration (FHWA) under the Motor Carrier Safety Act, 49 U.S.C. § 3102, and 49 App. U.S.C.§ 2505[1], to issue a rule prohibiting the use of radar detectors in commercial motor vehicles (CMV's) engaged in interstate commerce. The challenged regulation was issued on December 14, 1993 as the final rule of the FHWA.

Jurisdiction of the Court of First instance, the United States Court of Appeals for the Sixth Circuit, was invoked by Petitioners (parties to the rulemaking proceeding) on a Petition seeking judicial review of that rulemaking, and was

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[1] The 1984 Safety Act was recodified at 49 U.S.C. § 31,131 et seq. by Pub. L. No. 103-272 on July 5, 1994. 49 U.S.C. § 3102(b) of the 1935 Act, as amended, was also recodified by Pub. L. No. 103-272 at 49 U.S.C. § 31,502(b). Citation to the previous statutes are used in this Petition for clarity since the changes were not substantive and the previous provision were used by the Sixth Circuit in their Opinion.

predicated upon 28 U.S.C. § 2321(a) and 2342 (5). The petition was filed in the United States Court of Appeals for the Sixth Circuit within the sixty day period prescribed by 28 U.S.C. § 2344.

The petition challenged the rule on the grounds that the FHWA departed from historical precedent, lacked technical justification, and was motivated by improper political pressure.

The petition further addressed §342 of Public Law 102-143. That section, which was enacted by a rider to the Department of Transportation and Appropriations Act of 1992, required the FHWA to reverse its professional judgment, based upon its consideration of all traffic safety data, that no rulemaking to ban detectors in CMV's should issue. FHWA was directed to institute that rulemaking despite its conclusion that the matter was "best left to the states," and notwithstanding its determination that the rulemaking was prohibited by Executive Order 12612.

Petitioners claimed that § 342 breached the separation of powers mandated between the legislative and executive branches of the federal government.

B. REFUSAL OF CONGRESS TO BAN RADAR DETECTORS, EXECUTIVE ORDER NO. 12612, AND FHWA RESPONSE TO §342

Congress has declined to enact any law prohibiting the use of radar detectors in interstate commerce, thereby refusing to interfere with traditional prerogatives of the states to enforce highway safety, regulate the insurance industry, and to determine the sale of legitimate articles of commerce.[2]

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[2] See, e.g., S. 1418 (introduced August 6, 1993); H.R. 881 (introduced February 6, 1991); H.R.

Executive Order No. 12612, governs FHWA rulemaking. Enacted on October 26, 1987 (set forth in the Appendix at A-83-89); the Executive Order provides in part:

> Sec. 2 Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental principles:
>
> (a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government. ...
>
> (e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublician tendencies." ...
>
> (i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties

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224 (introduced January 3, 1989); H.R. 2102 (introduced April 21, 1989). Each of these bills proposed to ban use of detectors or to provide penalties for their manufacture, sale and use. Congress declined to enact any of these bills.

> regarding the legitimate authority of the national government should be resolved against regulation at the national level ...
>
> Sec. 3 (b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:
>
> (1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them.

On two occasions in 1988 and January 1991, the FHWA interpreted this Executive Order to bar the institution of a rule to ban radar detectors in CMV's. Exercising its best independent professional judgment that traffic safety data was inconclusive, that the institution of rulemaking was not necessary, and that a problem of "national scope" had not been presented, the FHWA determined that the decision of whether to ban radar detectors in CMV's was "best left to the States".

By a rider to the Department of Transportation's 1992 Appropriations act, §342 of Public Law 102-143 (signed October 28, 1991), imposed without benefit of a hearing or any proposed legislation addressing the substantive issue of the use of radar detectors, Congress directed FHWA to reverse its position and to vitiate its construction of the Executive Order governing its actions.

In its Notice of Proposed Rulemaking (NPRM), FHWA stated that the rulemaking "responds" to Public Law 102-143, acknowledged that the rule would "limit the policymaking discretion of the States", and stated that its reversal of position was required by and based upon §342:

> The proposed rule would limit the policymaking discretion of the States. The FHWA has reviewed the proposed ban on radar detectors in light of the purposes of the underlying legislation and the Executive Order on Federalism (Executive Order 12612 ,October 26, 1987), which requires Executive departments and agencies to be guided by certain fundamental federalism principles while formulating and implementing policies. These policies have been taken fully into account in the development of this proposed regulation.
>
> In 1988, FHWA received a similar petition from five of the organizations that signed the 1990 petition. On November 8, 1988, the FHWA denied that petition on the grounds that a Federal ban on radar detectors would violate the principles of federalism because the problem "is common to the States and not truly national in scope." The FHWA continues to believe that the enforcement of speed limit laws on the highways is a problem which is, in general, common to the States and not truly national in scope.
>
> * * *
>
> Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on

> Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate area for the Federal Government to regulate[3]. Federal Register, Vol 57. No. 16 (January 24, 1992) at p.2886 (A-60).
>
> Pointedly FHWA concluded:
>
> It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. Because this notice is being issued in response to a statutory mandate, the FHWA has determined that this action accords fully with the Federalism Executive Order. (Emphasis supplied.) Id. at p. 2887 (A.60).

No clearer statement of the purpose and effect of § 342 can be imagined.

C. HISTORY OF THE RULE

Radar detector use in commercial motor vehicles is legal in 47 of the 50 states. Notwithstanding intense lobbying by the insurance industry before state legislatures to ban detectors, more than two hundred bills to ban detector use have been have been rejected by the

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[3] Senate Report Number 102-148, 102d Congress, First Session, page 90 (1991) (footnote in original).

legislatures of forty (40) states. (R.35[4], Comment by Radar in response to NPRM, p. 1). Similarly, attempts to deny motor vehicle insurance to detector users have been uniformly rejected by state insurance departments.[5]

Having failed in their "anti-detector" efforts before state legislatures and state insurance commissions, the insurance industry and other opponents of radar detectors petitioned the FHWA in May, 1988, to undertake rulemaking to ban the use of detectors in commercial motor vehicles. On November 8, 1988, FHWA denied that petition:

> The President, in his Executive order on federalism (Executive Order No. 12612), ordered executive departments and agencies to be guided by certain fundamental federalism principles in formulating and implementing policies that have federalism implications. It is our view that the enforcement of speed limit laws on the highways is a problem which is common to the States and not truly national in scope. As a common State problem, we believe that the States, acting either individually or together, can effectively deal with this matter. Moreover, in determining the best methods and means to address in this problem, we believe that the States uniquely

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[4] In this Petition R-_ indicates the numbered reference to the document in the rulemaking docket.

[5] Insurance commissioners for the states of Arizona, California, Maryland, Colorado, Kentucky, Maine and Maryland have rejected such action by insurers.

> possess the competence to discern the sentiments of the people. Currently, only the District of Columbia and, the states of Connecticut and Virginia have seen fit to pass legislation prohibiting the use of radar detectors. Several other States have considered bills that would prohibit the use of radar detectors; however, they have failed to enact such legislation. The FHWA has carefully reviewed the petition in light of the Executive order and finds that, based on the available information, such action as proposed by the petitioners would be inconsistent with that Executive order." (R.35, Exhibit to Comment of Radar to NPRM).

On July 18, 1990, opponents of detectors filed another petition with FHWA, asking once again that FHWA commence rulemaking to prohibit radar detectors in CMV's. Contemporaneous studies commissioned by the National Highway Traffic Safety Administration (NHTSA) to address the "Impact of Radar Detectors on Highway Traffic Safety," (R.15, 1988, D.O.T. 45807518), had concluded that the influence of detectors, if any, "on the overall traffic stream is slight," and that the cost of further studies on the subject was not warranted by the "magnitude of the potential negative effect of detectors on traffic safety." (Id. at 38-40). (R.6, Preliminary Regulatory Evaluation at p. B-1). FHWA took no action on the 1990 petition.

In its May, 1991 report regarding "Commercial Motor Vehicle Speed Control Devices," NHTSA rejected the argument that radar detectors use in CMV's required the regulation of the speeds traveled by heavy trucks. NHTSA concluded that, "[A]lthough a larger percentage of heavy trucks are equipped with radar detectors," the imposition of

federally mandated speed control devices on heavy trucks was not justified because the "potential effectiveness" of mandatory speed limitation in terms of either "crash reduction" or lives saved was "questionable." (R.16, Report p. 2-1). Consistent with this judgment, FHWA and NHTSA concluded, after an exhaustive review of traffic safety studies, in their January, 1991, Working Group Study, "Report on Speed," that:

> Recent studies have indicated that vehicles equipped with radar detectors generally travel at speeds higher than those not equipped with radar detectors. However, no studies have established a correlation between radar detector use and the actual risk of crashes (NHTSA] FHWA/p.63] "Without any conclusive evidence that radar detectors have a negative effect on highway Safety, States would best be served if left to make their own decision on whether or not to ban such devices." [NHTSA/FHWA, p. 54] (Preliminary Regulatory Evaluation R.6, p.B-1).

By a rider adopted to the 1992 DOT Appropriations Act, controlling the budget of the FHWA, the Senate Committee on Appropriations directed FHWA to reverse its field and issue a notice of proposed rulemaking (NPRM) "to prohibit the use of radar detectors in operating commercial motor vehicles." § 342 of Public Law 102-143 (signed October 28, 1991) provided:

> The Secretary of Transportation shall publish by January 15, 1992, a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety Regulations to

> prohibit the use of radar detectors in operating commercial vehicles. Such notice shall solicit testimony regarding the safety, economic and operational aspects of prohibiting radar detectors in commercial operations. (A-81, R.1, p.1)

FHWA complied. By its NPRM, published on January 24, 1992, FHWA initiated the rulemaking here at issue to fulfill "the Congressional mandate in § 342 of the Department of Transportation and Related Agencies Appropriations Act," (A-51, R.3, Federal Register, Advanced Notice of Proposed rulemaking, 57 Fed. Reg. 2885, January 24, 1992).

The comment period in response to the NPRM closed May 26, 1992. FHWA took no action on the rulemaking for the next eighteen months. In April, 1993, more than a year after the close of the comment period, FHWA testified before Congress that the data presented neither established a "direct link" between radar detector use and CMV accidents, nor did it establish a "clear relationship" between the radar detector bans already in effect and "enhanced commercial motor vehicle safety." (A-93-94, D.O.T. and Related Agencies Appropriations for 1994; hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 103d Congress, First Session, p.598).

In September 1993, the Senate Committee on Appropriations, acknowledged that the "FHWA has indicated that there is inadequate information on the role of detectors in crashes involving commercial motor vehicles," (A-90, S. Report 103-150, Accompanying H.R. 2750- (emphasis supplied) and directed that FHWA conduct the studies required to obtain that information:

"The FHWA has indicated that there is inadequate information on the role of radar detectors in crashes involving commercial motor vehicles. Although accident causation is difficult to determine, it would be worthwhile to obtain quantitative data to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding by operators of commercial motor vehicles." (Emphasis supplied). (A-90, S.Rept. 103-150, p. 109-110).

To this end the Committee directed FHWA:

" . . . to conduct a study indicating the presence, or lack thereof , of radar detectors in commercial vehicles that were involved in crashes in which commercial vehicles were believed to have been or were charged with exceeding the posted speed limit. Also FHWA should also determine the presence or lack thereof of radar detectors in commercial motor vehicles. A comparison of these two populations should be used to determine whether commercial motor vehicles with detectors are overrepresented in crashes that involve speed.

The analysis must meet strict criteria for reliability so that its results are not suspect." Id.

Nevertheless, once again, the Committee on Appropriations directed FHWA to ban detectors despite the

lack of technical justification for that action, stating that the Committee was:

> "...displeased that the FHWA has not moved forward with rulemaking that would ban radar detectors in commercial motor vehicles."[6] (A-90).

The message was not lost on FHWA. After sixteen months of inaction based upon its own review, and without performing the study required to enable FHWA to make a valid assessment of the safety justification for banning radar detectors in CMV's, FHWA forwarded the proposed rule to OMB on October 8, 1993 -- one week after the Appropriations committee expressed it "displeasure."

On December 14, 1991, FHWA issued its rule amending 49 C.F.R. Parts 390 and 392 (A-51-68) to ban the use of radar detectors in all CMV's. That rule added § 392.71 to provide:

> "(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.
>
> (b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section."

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[6] The Committee directed the FHWA Administrator to inform the Committee "as soon as possible on the future direction that the agency will pursue regarding this matter." (A-91,S. Report 103-150, accompanying H.R.2750.)

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE SEPARATION OF CONGRESSIONAL AND EXECUTIVE POWERS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FHWA'S PROFESSIONAL JUDGMENT WAS CLEAR THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A RADAR DETECTOR BAN. BASED UPON ITS REVIEW OF TRAFFIC SAFETY DATA, FHWA INTERPRETED THE EXECUTIVE ORDER CONTROLLING ITS ACTIONS TO REQUIRE THAT NO RULE ISSUE. WITHOUT THE INTRODUCTION OF LEGISLATION SEEKING TO AMEND OR REVISE THE MOTOR CARRIER SAFETY ACT OR TO PROHIBIT RADAR DETECTORS IN COMMERCIAL MOTOR VEHICLES AND WITHOUT THE BENEFIT OF CONGRESSIONAL HEARINGS ADDRESSED TO THE SUBSTANCE OF A RADAR DETECTOR BAN, CONGRESS USURPED FHWA'S EXECUTIVE FUNCTION BY ENACTMENT OF A RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT REQUIRING FHWA TO REVERSE ITS PROFESSIONAL JUDGMENT AND TO COMMENCE RULEMAKING TO BAN RADAR DETECTORS IN CMV'S.

A. SEPARATION OF POWERS

By a rider adopted to the 1992 DOT Appropriations Act, controlling the budget of the FHWA, the Senate Committee on Appropriations directed FHWA to reverse its field and issue a notice of proposed rulemaking (NPRM)

"to prohibit the use of radar detectors in operating commercial motor vehicles."

FHWA on two occasions immediately prior to undertaking this rulemaking determined that no rulemaking should be commenced. FHWA twice concluded, pursuant to the Executive Order 12612 that no "problem" which was "national in scope" had been presented by the use of radar detectors in CMVs, (denial of 1988 Petition; Report on Speed, R.36). FHWA reviewed all traffic safety studies directed to the issue, found the data to be inconclusive, and concluded that the states "would be best served," if left to make their own decisions regarding radar detector use, (R.36).

FHWA does not even pretend that intervening reports or subsequent analysis affected its judgment regarding its decision to commence the rulemaking process. FHWA simply "turned on a dime" at the will of the Senate Committee on Appropriations.

In its Notice of Proposed Rulemaking (NPRM) FHWA noted:

> Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate area for the Federal Government to regulate[7]. Federal Register, Vol 57. No. 16 (January 24, 1992) at p.2887 (Emphasis added) (A-59).

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[7] Senate Report Number 102-148, 102d Congress, First Session, page 90 (1991) (footnote in original).

FHWA, thus reversed both its professional judgment that traffic safety data did not present a problem "national in scope," and it's interpretation of Executive Order 12621:

> It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. Because this notice is being issued in response to a statutory mandate, the FHWA has determined that this action accords fully with the Federalism Executive Order. (Emphasis supplied.) (A-60).

The Sixth Circuit concluded that Congress did not order FHWA to ban detectors and therefore rejected, without further comment, the argument that the rider to the appropriations act violated the separation of powers required between the executive and legislative branches of federal government. The Sixth Circuit's entire comment with regard to separation of powers is:

> Therefore, Congress did not force the agency to consider factors outside of those in the 1984 Safety Act but simply directed that a rulemaking be undertaken pursuant to, an in accordance with the rulemaking provisions of the 1984 safety act. Thus, we also reject petitioner's argument that by ordering the agency to ban radar detectors in CMV's Congress violated the principles of separation of powers. See Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). (A-25, 47 F.3d. at 807).

The analysis does not address the problem. FHWA's determination not to issue the rulemaking was a substantive judgment, based upon its evaluation of all available traffic safety data. Indeed as noted by both FHWA and NTHSA in their "Report on Speed" issued in January, 1991 only 10 months before the enactment of § 342:

> Without any conclusive evidence that radar detectors have a negative effect on highway safety, States would be best served if left to make their own decision on whether or not to ban such devices. [NHTSA/FHWA, p. 54.] (R.6, Preliminary Regulatory Evaluation, supra. p. B-1).

On its face, §342 flatly reverses both FHWA's professional judgment and its interpretation of the Executive Order.

The "ultimate purpose of ... separation of powers is to protect the liberty and security of the governed." Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236, 256 (1991). Congress may not "invest itself or its Members with executive powers." Id. 115 L.Ed. at 257. While Congress might "enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards:"

> If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the powers is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art I, §7. In short, when Congress "[takes action] that ha[s] the

> purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch", it must take that action by the procedures authorized in the Constitution. See, Chada, 462 U.S., at 952-955, 77 L.Ed. 2d. 317, 103 S.Ct. 2764[8]. Id. 115 L.Ed. at 257.

Congress did not act to define or amend the Motor Carrier Safety Act (MCSA). It did not adjust the federal-state relationship by declaring detectors to be inimical to the free flow of interstate commerce through legislation banning their use in CMV's, but rather ordered FHWA to take executive administrative action through a rider to the D.O.T. Appropriations bill. FHWA was then pressured through the subsequent actions of the Senate Committee on Appropriations, which controlled its budget, to proceed with the rulemaking.

The process was perverted. The "federal political process" designed to ensure the proper balance of federal and state prerogatives under the Commerce Clause, the 10th Amendment to the United States Constitution, and the MCSA itself, failed to protect the "liberty and security of the governed," violated state autonomy, and conflicted with MCSA. Reversal of the rule is required to effect a remedy "tailored to compensate for possible failings in the national political process." Garcia v. San Antonio Metro, 469 US 528, 105 S.Ct. 1005, 836 L.Ed. 2d 1016 (1985).

The FHWA notice of proposed rulemaking to ban detectors acknowledges the direction which it received, and concluded that given Congressional direction, the rulemaking must proceed. The NPRM itself acknowledged the lack of technical justification for the rule.

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[8] INS v. Chada, 462 U.S. 919, 103 S.Ct. 2764 77 L.Ed. 2d. 317 (1983).

Moreover, it is "Alice in Wonderland" to conclude that FHWA was not "ordered" to ban use of detectors in CMV's, (A-25) 47 F.3d at 807. Having been told by the Senate Committee controlling its budget to issue a rule which it had twice determined was not justified, FHWA's direction was clear and the outcome of the rulemaking was preordained.

B. THE RULE WAS THE RESULT OF IMPROPER CONGRESSIONAL PRESSURE

The Sixth Circuit devoted most of it's analysis with regard to the issue of improper Congressional pressure to cases decided on grounds other than separation of powers (A.23-27, 47 F.3d 806-808).

The cases on which the Sixth Circuit relied hold that improper Congressional pressure may be a violation of the substantive enabling statute, the Administrative Procedure Act, or amount to a violation of due process:

> Before an administrative rulemaking may be overturned on the grounds of Congressional pressure, two conditions must be met. "First, the content of the pressure upon the Secretary [must be] designed to force him to decide upon factors not made relevant by Congress in the applicable statue ... Second, the Secretary's determination must be affected by those extraneous considerations". Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (citing, D.C. Fed'n of Civic Ass'ns v. Vople, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972); Peter kiewit Sons' Co. v. United States Army Corps of Eng'rs, 714 F.2d 163, 169-70 (D.C.

Cir.1983); Town of Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d. Cir. 984); Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F.Supp. 496, 579 (S.D. Ohio 1982). (A-25-26, 47 F.3d at 807).

As the Court noted in D.C. Federation, 459 F.2d at 1246-47 (emphasis added), in striking Department of Transportation action because of "pressures emanating" from a member of Congress:

> . . . the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher. Judge Fahy agrees, and we therefore hold, that on remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes . . .
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> * * *
>
> If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," his action proceeded from an erroneous premise and his decision cannot stand. The error would be more flagrant, of course, if the Secretary had based his decision solely on the pressures generated by Representative Natcher. But it should be clear that his action would not be immunized merely because he also considered some relevant factors."

The Sixth Circuit determined that congress "merely directed the agency to publish a notice of proposed rulemaking in order to 'solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations' " and that "the Congressional remarks made by the 1993 Senate Appropriations Act did not direct the agency to adopt a ban." (A-25-26, 47 F.3d at 807).

However, it is clear from the history of the rule, and the NPRM itself, that the decision to initiate the rulemaking was "based in whole" upon §342 and that the outcome of the process was tainted by "pressure emanating" from the Senate Committee on Appropriations.

Nor is there any provision of the MSCA, authorizing Congress to direct FHWA to institute rulemaking which it had determined does not address a problem of national scope. To the contrary the MSCA specifically proscribed the unnecessary preemption of state laws, 49 U.S.C. App. §2505(c), in this case the judgment of forty state legislatures which have specifically rejected detector bans.

Congress had the opportunity to amend the Motor Carrier Safety Act to ban radar detectors, but chose not to do so on several occasions. FHWA was empowered to exercise professional judgment under the MSCA to enact a ban if it determined that it was justified, and was consistent with the dictates of federalism set forth in Executive Order 12621. FHWA, based on its professional judgment on two ocassions refused to enact such a ban. However, "displeased" the Senate Committee on Appropriations may have been with FHWA's professional judgment, it was not free to "order" FHWA to reverse its course through the enactment of the rider in question and to thereafter pressure FHWA during the rulemaking process to issue the rule.

2. THE RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT IGNORED MANDATED EVALUATION OF COSTS TO THE 50 STATES WHICH RESULTED IN AN UNFUNDED ADMINISTRATIVE MANDATE TO THE 50 STATES WHICH CONGRESS PREVIOUSLY REFUSED TO ENACT

As noted by the rule itself, FHWA was required to assess the cost of the proposed rule. 49 U.S.C. §3102 provides in pertinent part:

> (d) Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

Although the statement offered by FHWA in support of the rule purports to assess these costs, it is incomplete, without a factual basis, and in violation of the law. See e.g., Appalachian Power Co. v. Train, 545 F.2d, 1351 (4th Cir. 1976); Hooker Chemicals & Plastics, v. Train; 537 F.2d 629, 642 (2d Cir 1976)[9]. While evidence in the record was presented that the cost of enforcement of the rule to the average state would run 2,000,000 per year, no evaluation of the cost of enforcement to the states is offered by FHWA. Given that the FHWA here attempts a nationwide ban which must be enforced by the states to be effective, including 47 states which have not seen fit to ban detector use and 40 states which have rejected attempts to do so, it cannot be concluded that FHWA has complied with this statutory limitation on its regulatory authority, by ignoring the cost of enforcement to the states.

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[9] For this reason the rule is also arbitrary and capricious.

The Sixth Circuit held that the failure of the FHWA to determine the costs to the states was of no consequence (A-22, 47 F.3d 806). However, this is clearly an unfunded mandate since there are no real federal law enforcement agencies who would enforce the detector ban and enforcement would be left entirely to the States. Nor can it be claimed that a cost benefit analysis is not necessary because a state may choose not to enforce the ban. FHWA's failure to assess the cost of enforcement by the states violates both the cost-benefit requirement and the due respect for federalism required by both the Motor Carrier Safety Act and the executive order governing FHWA's actions.

FHWA's analysis was further flawed, in that FHWA "assumes," (R.7, Regulatory Evaluation at p. 10), a reduction in costs without providing any basis in fact for its "assumptions".

To support its conclusion, FHWA merely identifies the number and cost of injuries arising out of all CMV crashes and:

> " . . . assumed that all of the relevant injuries, those involving speeding and radar detectors would become less severe by one MAIS level. We also assumed that one-third of effected fatalities would instead be reduced to incapacitating injuries" (R.7, Regulatory Evaluation at p.10).

First, FHWA offers no basis for determining the number of "relevant injuries, those involving speeding and radar detectors." Without undertaking an analysis of the incidence of CMV crashes involving detector use, the risk

of accident cannot, and has not been determined[10]. Second, not one word is offered by FHWA to explain the facts upon which it based its "assumptions," e.g., that all relevant injuries "would be reduced by 1 mais level."[11] It is simply not credible to assert that a ban against detectors use in CMV's engaged in interstate commerce will save $68 million dollars per year.

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[10] Without this analysis, there is no legitimate way of assessing any savings in cost to a detector ban. No one knows better than FHWA, that it cannot simply "assume" that detectors will be involved in a given number/percentage of CMV accidents. NHTSA recognized as much in its study on Commercial Motor Vehicles speed control devices; and FHWA concluded that it had "inadequate information" on the role of detectors in CMV crashes.

[11] The studies relied upon by FHWA show that most trucks with detectors travel with the flow of traffic, where no slowing, and therefore no savings at all may be expected to occur as a result of the enforcement of the rule. Similarly, the studies relied upon by FHWA in enacting the ban rely on a purported correlation of detector use and high speeds; most heavy truck crashes, however do not occur on roadways where these very high travel speeds are prevalent.

Less than 1% of total fatal crash involvements of all heavy trucks occur at these speeds. Combination-unit truck fatal crash involvements in excess of 70 mph represent only about 1 of every 800 combination unit truck involvements at all speeds. There are only an estimated 30 fatal crash involvements annually involving combination unit trucks at speeds in excess of 70 mph. (R.16 Commercial Motor Vehicle Speed Control Devices, at ES-1, 3-5, 3-10, 3-12, 3-14).

FHWA could have assessed the cost of enforcement to the fifty (50) states, upon which the efficacy of the ban purportedly depends, but failed to do so.

3. THE SIXTH CIRCUIT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDING IN FINDING THAT THE RADAR DETECTOR BAN WAS NOT ARBITRARY AND CAPRICIOUS

Rulemaking which exceeds statutory authority, or fails to take into account all relevant considerations, is arbitrary and capricious. See e.g., Motor Vehicle Manufacturer's v. State Farm Mutual, 463 U.S. 29 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983); Public Citizens Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir 1986). Ladies Garment Workers v Donovan, 722 F.2d 795, 822-26 (D.C. Cir. 1983); Action on Smoking and Health v. CAB, 699 F.2d 1209, 1217 (D.C.Cir. 1983), Ritter Transport v. ICC, 684 F.2d 86, 88 (D.C.Cir. 1982). Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir 1975). A rule which fails to consider an important aspect of the problem at issue must be reversed. See e.g., State Farm, supra. at 43; Public Citizens, supra. at 1507. Further, an agency must respond in a "reasoned" manner to "explain how the agency resolved any significant problems raised by the comments and to show how that resolution led the agency to the ultimate rule." State Farm, supra; Rodway, supra at 817; See also, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 1375; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d. Cir. 1965). Such action is "inextricably intertwined" with the requirement that the agency solicit comments in the first instance. See e.g., Rodway, supra at 817. The agency must "set forth with clarity the ground for its rejection of opposing views," International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon,

J. concurring). Moreover an agency must offer a reasoned analysis supporting its change in position State Farm supra. at 57; Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970) and provide a principled explanation for its change in direction. See e.g., State Farm and Greater Boston supra.; National Black Media Coalition v. FCC, 775 F.2d 342, 355 (D.C. Cir. 1985).

In this case, FHWA prohibited the use of radar detectors in CMV's without finding, or rendering any professional judgment, that detector use causes or contributes to the occurrence of CMV accidents. The determination of whether their is a "correlation between radar detector use and the actual risk of crashes," is the key issue. (FHWA/NHTSA Working Group Study p.54, 63; preliminary regulatory evaluation R.6, at B-1).

The rule is further arbitrary and capricious, in that it fails to assess the impact upon traffic safety of banning detector use in only one class of vehicles-CMV's-while leaving passenger and other vehicles unregulated. FHWA acknowledges the fact that studies by "FHWA and other groups over the last 25 years," (Preliminary Regulatory Evaluation, R.6, at B-6) demonstrate that an increase in the variance of speed between the slowest and fastest vehicles in a traffic stream increases the risk of accident, yet it did not consider, and renders no professional judgment whatsoever on the effect which its rule will have on speed variance of vehicles within the traffic stream and the occurrence of CMV accidents[12].

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[12] If the rule serves the purpose intended, it may be expected to increase the risk of CMV crashes by creating a greater disparity in speed between trucks subject to the ban, and passenger vehicles and trucks not subject to regulation, by purportedly reducing the travel speed of some trucks while leaving the speed of passenger and other vehicles unaffected.

The rule is further vulnerable, because there is no evidence in the record that any group of CMV drivers select higher speeds because they operate detectors.

FHWA has "failed entirely to consider an -- important aspect of the problem," State Farm, supra, the crucial relation of detector use and its proposed action to the risk of CMV accidents.

It is clear FHWA failed to consider "all relevant factors" and "relevant evidence" presented by the record, State Farm, supra. FHWA neither "explained how the agency resolved significant problems" raised by appellants comments, nor did it "set forth with clarity," or otherwise, the "ground for its rejection of opposing views." Rodway and International Harvester.

Without making any determination whatsoever that CMV use has an effect on the occurrence of CMV accidents, without any evidence of bans being effective to reduce traffic speeds or accident risk or severity, without considering the low incidence of accidents in heavy trucks- the class of CMV's with the highest detector use, and without any evidence that detector use cause CMV crashes or higher speeds, FHWA has created a rule banning radar detectors in only one class of vehicles, CMV's, thereby increasing the variance in speeds between passenger vehicles and CMV's and threatening to cause , according to established highway traffic analysis, a greater risk of CMV accidents.

CONCLUSION

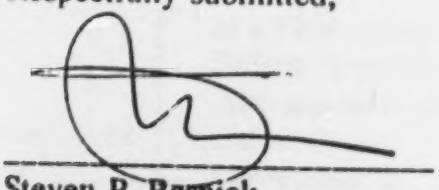
FHWA reversed its prior position that no rulemaking banning detectors should commence in response to the directive of the congressional committee with jurisdiction over its budget, set forth in §342. It commenced rulemaking solely because the rider attached to the Appropriations Act controlling its budget directed it to do

so. It proceeded to ban detectors in response to pressure from the Senate Committee on Appropriations.

In so doing Congress usurped the executive function and caused the FHWA, without considering important aspects of the problem and without conducting the required cost benefit analysis, to improperly alter the relationship between the States and the Federal Government and impose an unfunded administrative mandate on the States, by enacting a rule banning the use of radar detectors in CMVs.

The issues presented should be reviewed and the rulemaking should be reversed.

Respectfully submitted,



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